State of Michigan

In the Supreme Court

People of the State of Michigan,
Plaintiff-Appellee,

v

Melvin Earl Howard,
Defendant-Appellant.

Michigan Supreme Court
No. 153651

Court of Appeals
No. 324388

Lower Court
No. 13-1442 FH

Brian L. Mackie (P25745)
Washtenaw County Prosecutor
Attorney for Plaintiff-Appellee
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

Christine A. Pagac (P67095)
Attorney for Defendant-Appellant
645 Griswold St., Suite 3300
Detroit, MI 48226
(313) 256-9833

Plaintiff-Appellee's Supplemental Brief on Application for Leave to Appeal

Brian L. Mackie (P25745)
Washtenaw County Prosecutor

By: Mark Kneisel (P49034)
First Assistant Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

Introduction

The Court has directed a Mini Oral Argument on the Application (MOAA) and ordered supplemental briefing addressed to four questions:

(1) whether manifest necessity justified the grant of a mistrial at the defendant's first trial;

(2) whether defense counsel implicitly consented to the grant of a mistrial;

(3) whether defense counsel was ineffective for not moving to dismiss on double jeopardy grounds prior to retrial; and

(4) whether the statement in *People v Johnson*, 396 Mich 424, 432 (1976), that "[m]ere silence or failure to object to the jury's discharge is not such consent," is an accurate statement of law.[1]

Plaintiff-Appellee, the People of the State of Michigan, asserts that manifest necessity did justify the trial court in declaring a mistrial, that defense counsel did consent and was not ineffective in eschewing a futile motion to dismiss, and that *Johnson* is incorrect in that it forecloses consideration of each case's particular circumstances.

Further, the People suggest that the respective analyses and their germane facts necessarily blend somewhat. As presaged in the previous paragraph, consideration of all of this case's particular circumstances in a holistic fashion will best serve the Court's consideration of its questions, and leads to the conclusion that the interest in fair trials and just judgments warranted the second trial. And crafting a totality framework will assist the state's trial and appellate courts going forward.

[1] *People v Howard*, ___ Mich ___; 886 NW2d 645 (2016).

Table of Contents

Index of Authorities

Other Authorities

Counterstatement of Jurisdiction

This Court has jurisdiction in this case, and has directed argument on the application. MCRs 7.303(B)(1), 7.305(H)(1).

Counterstatement of Questions Involved

I. In the first, terminated, trial, the trial court thanked the prosecution for bringing false testimony to its attention, and concluded that the jury was tainted to a degree of unfairness to both parties. Was the mistrial warranted by a high degree of necessity?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court answered, "Yes."
The Court of Appeals concurrence answered, "Yes."

II. Trial counsel was in the midst of a trial at which he was not going to be able to present the testimony of two witnesses on Defendant's behalf. Several opportunities to object to a mistrial presented themselves. Given that motive and those opportunities, did counsel implicitly consent to the mistrial?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court was not presented with this question.
The Court of Appeals answered, "Yes."

III. With a new trial scheduled, and anticipating the resurrected opportunity to call all of the witnesses he wanted, counsel did not move for a dismissal on double jeopardy grounds. Any such motion would have resulted in additional information regarding both the necessity for, and Defendant's consent to, the mistrial being made part of the record. Was eschewing such a motion reasonable?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court was not presented with this question.
The Court of Appeals answered, "Yes."

IV. Appellate review of mistrials, manifest necessity, and consent, demands consideration of the entire record. Does precedent grounded, semantically and analytically, in the "mere" review of one instantaneous moment of silence within a trial record frustrate that demand?

Plaintiff-Appellee answers, "Yes."
Defendant-Appellant answers, "No."
The trial court was not presented with this question.
The Court of Appeals answered, "Yes."

Counterstatement of Facts

With one addition, the factual recap presented by the Court of Appeals in this case is sufficient for this Court's consideration of the issues contemplated within the MOAA.

That addition goes back to the very beginning of the first trial. On Monday morning, before the venire was brought to the courtroom, defense counsel told the court that he had only just subpoenaed witnesses Sanders and Simmons to appear for that Thursday. The court indicated that the trial would be finished before then.[2] (Indeed, the second trial began on a Monday morning and the verdict was returned at 1:00 that Tuesday afternoon. Witnesses Sanders and Simmons both testified on Defendant's behalf at the second trial.[3]) Prior to the mistrial discussions and declaration, then, counsel anticipated his inability to call all of his witnesses.

[2] Trial Transcript (TT) 3.24.14, pp 4-5.
[3] See, generally, TTs 6.30.14 & 7.1.14.

Argument

Melvin Howard sexually assaulted a sleeping (and intoxicated) woman after a small gathering, and was charged with that crime. He possessed the right to have his trial completed by the first empaneled jury.[4] The people in this state had an interest in a full and fair trial toward proving the crime.[5]

The protection against double jeopardy is a crucial, indeed constitutionally guaranteed, aspect of the criminal justice system.[6] Its importance has spawned various axioms, repeated and ingrained to the point of tautology. Those axioms, however, must be applied with the particular facts of each case in mind, lest divorcing the language of the relevant precedent from their factual underpinnings results in distorted analyses.[7]

As detailed in the following analyses, review of the entirety of the record in this case results in the conclusions that the trial court was faced with a spoiled jury, that Defendant had ample opportunity to object to the mistrial and strong motive not to, that counsel's performance was both reasonable and not prejudicial, and that a perfunctory passage from a previous case does not accurately state the law.

[4] *People v Lett*, 466 Mich 206, 215; 644 NW2d 743 (2002).
[5] *Lett*, 466 Mich at 216.
[6] Const 1963, art 1, § 15; US Const, Ams V and XIV.
[7] *Illinois v Somerville*, 410 US 458, 469; 93 S Ct 1066; 35 L Ed 2d 425 (1973).

I. In the first, terminated, trial, the trial court thanked the prosecution for bringing false testimony to its attention, and concluded that the jury was tainted to a degree of unfairness to both parties. A high degree of necessity warranted the mistrial.

Standard of Review

Generally, this Court's inquiry whether manifest necessity justified declaration of a mistrial asks whether the trial court abused its discretion in so finding.[8] But this Court has also articulated a more granular spectrum regarding discretion and manifest necessity. As exemplars, instances of necessity suggesting unavailability of a prosecutor's evidence or other potential prosecutorial overreach dictate a relatively stricter scrutiny of a trial court's discretion, while instances of necessity occasioned by jury deadlock are entitled to relatively more deference to that discretion.[9] In this case, Defendant did not preserve the basic standard of review, so the manifest necessity is actually reviewed for plain error.[10]

Discussion

Perhaps the most axiomatic double jeopardy protection is a defendant's protection against subsequent prosecution after an acquittal, even one fairly characterized as wrongful.[11] That did not happen here, yet that unquestioned protection nonetheless bears not only on our case, but also on cases yet to arise. For while there is symmetry in both parties' entitlement to a fair trial, there is

[8] *Lett*, 466 Mich at 220.
[9] *Lett*, 466 Mich at 218-220.
[10] *People v Carines*, 460 Mich 750, 774; 597 NW2d 130 (1999).
[11] *Arizona v Washington*, 434 US 497, 503; 98 S Ct 824; 54 L Ed 2d 717 (1978), citation omitted.

asymmetric availability of post-criminal-verdict appellate review and relief.[12] That asymmetry is a permanent feature of the criminal justice system, and must remain so.

But an improper asymmetry occasionally creeps into discussions of mistrials occasioned by manifest necessity. Two common characterizations of manifest necessity include: "sufficiently compelling circumstances that would otherwise deprive the defendant of a fair trial" and "if an impartial verdict cannot be reached."[13] The former must be jettisoned, or at least carefully cabined, as it suggests an asymmetry that is pointedly not justified.

Also informing the analysis is the unquestioned duty of a prosecutor to notify the court of false testimony.[14] Such an eventuality is just one of many circumstances from which a trial court might then conclude that one or more members of a jury might be biased against either a defendant or the prosecution.[15] And in this posture, symmetry does obtain: given the broad array of events that may trigger the manifest necessity of declaring a mistrial, even occasions that do not create unfairness to the accused can operate to subordinate that accused's right to complete his trial before an original jury "to the public interest in affording the prosecutor one full and fair opportunity to present evidence to an impartial jury."[16]

---

[12] *Evans v Michigan*, ___ US ___; 133 S Ct 1069, 1074; 185 L Ed 2d 124 (2013); *Wade v Hunter*, 336 US 684, 689; 69 S Ct 834; 93 L Ed 2d 974 (1949).
[13] *People v Rutherford*, 208 Mich App 198, 202; 526 NW2d 620 (1994); *Somerville*, 410 US at 464.
[14] See, e.g., *People v Lester*, 232 Mich App 262, 276; 591 NW2d 267 (1998), overruled on other grounds by *People v Chenault*, 495 Mich 142; 845 NW2d 731 (2014); and *People v Smith*, 498 Mich 466; 870 NW2d 299 (2015).
[15] *Wade v Hunter*, 336 US at 689.
[16] *Arizona v Washington*, 434 US at 505.

That is what happened here. The trial court thanked the prosecution for bringing the false testimony to its attention, and found no culpability on its behalf. The concurring appellate judge below similarly concluded that the prosecution fulfilled its duty concerning the false testimony. The trial court memorialized its concern that the first jury was possibly tainted beyond fairness, to either side. The concurring judge below likewise emphasized the possible jury taint with respect to both parties.

That emphasis was unnecessary. For even if the only conceivable bias stemming from the false testimony was against the prosecution, the public's interest in a full and fair chance at an impartial jury prevails. Because an acquittal, wrongful as it may be coming from a partial jury, is unappealable.[17] And that asymmetry is precisely what focuses us to the importance of various symmetries and the myriad difficulties faced by trial courts.

The variability of potential difficulties lends some support to the variability of deference this Court affords a trial court's discretion in this arena, as mentioned in the Standard of Review, above. Recall this is a case in which the trial court found no fault with—indeed, it even credited—the prosecution. When assigning the correct degree of deference to the trial court's discretion, this case is thus more akin to a hung jury than to prosecutorial overreach. Much deference is therefore due the trial

[17] *Evans*, 133 S Ct at 1074.

court—it observed the jurors and their reactions, and was otherwise familiar with the contours of the case.[18]

The People, along with the concurrence in the Court of Appeals, acknowledge the since-evaporated propriety of the trial court considering options other than a mistrial. But as the concurrence noted, the existence of other—unexamined—options should not amount per se to an abuse of discretion.[19] The sliding scales and continuums already at work in recognizing and reviewing manifest necessity suggest that a circumstance-based analysis is also appropriate when considering eschewed or ignored options to mistrials. Hung juries require no option considerations.[20] Judicial disability and prosecutorial error do.[21] The particulars of our case involve the opposite of prosecutorial error, along with a tainted jury (to which no party has a right[22]). As such, our circumstances counsel against a mandate that options be considered.

Hinting at analyses to follow in this Brief, one circumstance that would have nevertheless fomented a consideration of alternatives to a mistrial would have been input from defense counsel. But choosing to remain silent only to complain that a trial court neglected to address that which he now voices should never be an avenue to appellate relief.[23]

---

[18] *Gori v United States*, 367 US 364; 81 S Ct 1523; 6 L Ed 2d 901 (1961); *Washington*, 434 US at 513-514.
[19] *Lett*, 466 Mich at 221, n 13.
[20] *Lett*, 466 Mich at 221.
[21] *Lett*, 466 Mich at 221, n 13, citing *People v Hicks*, 447 Mich 819; 528 NW2d 136 (1994), *People v Benton,* 402 Mich 47; 260 NW2d 77 (1977), and *Arizona v Washington*, 434 US 497.
[22] *Arizona v Washington*, 434 US at 516.
[23] *United States v Puleo*, 817 F2d 702, 704-705 (CA 11, 1987).

Another thing likely to have resulted from articulation and consideration of possible alternatives to a mistrial would have been an explicit declaration of manifest necessity by the trial court. But that omission's irrelevance was announced by the United States Supreme Court in *Arizona v Washington*, and recently reconfirmed by that Court in *Renico v Lett*.[24] Instead, what is important is that the extant record provide adequate justification for the trial court's ultimate action. That adequate justification requires a high degree of necessity to qualify as manifest necessity.[25] A tainted—bilaterally or unilaterally—jury was that high degree of necessity, as "[a] trial judge properly exercises his discretion to declare a mistrial if an impartial verdict cannot be reached . . .."[26]

The concurrence in the Court of Appeals correctly determined that manifest necessity occasioned the mistrial. On that basis alone, this Court can deny Defendant's Application for Leave to Appeal.

[24] *Arizona v Washington*, 434 US at 516-517; *Renico v Lett*, 559 US 766; 130 S Ct 1855; 176 L Ed 2d 678 (2010).
[25] *Lett*, 466 Mich at 218.
[26] *Somerville*, 410 US at 464.

II. Trial counsel was in the midst of a trial at which he was not going to be able to present the testimony of two witnesses on Defendant's behalf. Several opportunities to object to a mistrial presented themselves. Given that motive and those opportunities, counsel chose to acquiesce to the mistrial.

Standard of Review

The issue of consent was not preserved in the trial court. As such, plain error review holds.[27]

Discussion

There are two, independent, routes to permissibly retrying a criminal defendant after a mistrial prematurely terminated a previous trial. The first, discussed above, is manifest necessity. The other is a defendant's consent.[28]

That consent can be explicit, or, consistent with precedent and the framing within this Court's Order for MOAA, implicit or inferred.[29] Further informing the inquiry into the existence of implicit consent is the Sixth Circuit's characterization of permissible consent as "acquiescence."[30] "The important consideration, for purposes of the Double Jeopardy Clause, is that the defendant retain primary control over the course to be followed . . .."[31] Given that one of the eventualities the Clause seeks to deflect is a defendant's anxiety, the focus on a defendant's control is apt.[32]

---

[27] *Carines*, 460 Mich at 774.
[28] *Lett*, 466 Mich at 215; *United States v Dinitz*, 424 US 600, 607-608; 96 S Ct 1075; 47 L Ed 2d 267 (1976); *United States v Gantley*, 172 F3d 422, 427 (CA 6, 1999).
[29] *People v McGee*, 469 Mich 956; 670 NW2d 665 (2003). See also *Gantley*, 172 F3d at 428-429, discussing material uniformity in federal Circuits.
[30] *United States v Cameron*, 953 F2d 240, 243 (CA 6, 1992).
[31] *Dinitz*, 424 US at 609. See also, *People v Hoffman*, 81 Mich App 288, 299; 265 NW2d 94 (1978).
[32] *Lett*, 466 Mich at 214 (citation omitted).

When the Court of Appeals analyzed Defendant's consent to the mistrial, it marshalled various aspects of the trial record: two mid-trial off-the-record discussions involving the court and both attorneys, the evident expectation that the trial court was going to take action, and the lack of any expression of disapproval by Defendant or counsel. In fact, in addition to the appellate court's recap of this prosecution statement—"Whatever the Court does, whatever action the Court takes, obviously, we will respect, and I understand that the Court has concerns as do I"—the prosecution two sentences later asked for the trial court's consideration before making "the ruling."[33] That record sufficiently supports Defendant's acquiescence, and thereby his consent.

But the Court of Appeals' analysis omitted two other aspects of the record that also compel the conclusion that Defendant maintained primary control. One of those aspects falls within the context of the Court of Appeals' litany, and is simply the lack of any expression of disapproval by Defendant or counsel in the moments and weeks after the mistrial declaration. The other omitted aspect takes us back to the very beginning of the first trial, and cements the conclusion that Defendant consented to the mistrial.

Recall that just prior to the venire's arrival in the courtroom that Monday morning, counsel alerted the trial court to his intention to have two witnesses appear to testify on that coming Thursday. The trial court explained that the trial was unlikely to require four days, so through counsel's oversight those two

[33] *People v Howard*, unpublished opinion of the Court of Appeals, issued March 8, 2016 (Docket No. 324388), slip op p 3, 6.

witnesses' testimony would not be presented to the jury.[34] We can easily conclude that the trial court was correct; the second trial, at which Defendant's two previously unavailable witnesses were able to testify, began on a Monday morning and finished with a verdict at 1:00 pm the very next day.[35]

Whatever anxiety Defendant may have experienced during the fourteen-week interval between the two trials was, first, alleviated by the ability to call all of his witnesses, and, second, certainly less than the anxiety that attended the inability to present his full defense to the first jury. In fact, it is not difficult to imagine the relief that counsel experienced, and communicated to Defendant, from first the chambers conference and then the bench conference leading up to the mistrial declaration.

All of those circumstances accrete, and easily provide sufficient evidence that Defendant consented to the mistrial. It is true that "he neither objected to nor agreed with the court's conclusion that a mistrial was warranted," but this Court in *People v McGee* concluded that such a circumstance is not dispositive.[36] A proper analysis accounts for the totality of the circumstances.[37] From less than the totality of the circumstances, the Court of Appeals rightly concluded that Defendant was aware that the trial court was anticipating a, indeed "the," mistrial and had the opportunity to oppose it. And to knowledge and opportunity, we can also add motive; motive to have a trial at which he could present his full defense.

---

[34] TT 3.24.14, pp 4-5.
[35] See generally TTs 6.30.14 & 7.1.14.
[36] *McGee*, 469 Mich 956, vacating *People v McGee*, 247 Mich App 325, 333; 636 NW2d 531 (2001).
[37] *Gantley*, 172 F3d at 429.

That last factor distinguishes this case from *McGee*, and presents an even stronger case for Defendant's consent. Mr. McGee's case proceeded nearly all the way to completion, going sideways only during the polling of the jury.[38] Defendant, on the other hand, faced a jury that would deliberate without evidence he wanted to—and was eventually able to—present. Furthermore, McGee asked for a dismissal of his case before retrial,[39] while Defendant proceeded to his second trial without complaint. This Court concluded that McGee consented, even considering his belated objection. Likewise did Defendant consent, especially considering his motive for a second go-round with all of his witnesses. The Court of Appeals got this right; it was even more right than it knew. Again, this Court can simply deny the Application for Leave to Appeal.

[38] *McGee*, 247 Mich App at 328.
[39] *McGee*, 247 Mich App at 330.

III. With a new trial scheduled, and anticipating the resurrected opportunity to call all of the witnesses he wanted, counsel did not move for a dismissal on double jeopardy grounds. Any such motion would have resulted in additional information regarding both the necessity for, and Defendant's consent to, the mistrial being made part of the record. Eschewing such a motion was reasonable.

Standard of Review

Whether a defendant has been denied the effective assistance of counsel is a mixed question of fact and constitutional law. Questions of constitutional law are reviewed de novo.[40] The burden is on Defendant to establish both that counsel's representation fell below an objective standard of reasonableness and that there is a reasonable probability that but for counsel's unprofessional errors the result of the proceeding would have been different.[41]

Discussion

The Court of Appeals' treatment of this issue was succinct, and correct.[42] And flying headlong into the admonition against hindsight, contemplating some "would-haves" also illustrates the wisdom of that result.

One thing that would have happened had Defendant moved for a dismissal is that the trial court would have had the opportunity to expand the (already sufficient) record. Details of both the chambers and bench conferences would have been supplied, providing further support for the necessity of the mistrial and Defendant's consent thereto. That is precisely what happened in *United States v DiPeitro*: in a post-mistrial order denying a defendant's motion to dismiss, a trial

[40] *People v Vaughn*, 491 Mich 642, 650; 821 NW2d 288 (2012).
[41] *Vaughn*, 491 Mich at 669.
[42] *People v Howard*, unpublished opinion per curiam of the Court of Appeals, issued March 8, 2016 (Docket No. 324388), slip op pp 6-7.

court supplemented a previously silent record with information germane to consent to the mistrial.[43] Just as it may be better to remain silent and be thought a fool than to speak and remove all doubt, one might choose to remain silent and harbor error than move for dismissal and illuminate the total lack of error. But harboring error should never lead to appellate relief.[44] Conversely, and just as fatal to Defendant's argument, his ongoing silence on this front is further evidence of his consent (see issue II., above).

Even a successful trial-level outcome would have subjected Defendant to the anxiety of protracted appellate litigation. Instead, Defendant was able to promptly proceed to a trial, with his previously absent witnesses, in the hopes of an acquittal. An acquittal that would have been impervious to appellate review of any sort.[45]

Objectively speaking, then, trial counsel's performance was reasonable, even if ultimately unsuccessful. Such is the case that trial counsel cannot be faulted for failing to make a meritless motion.[46]

Nor can Defendant establish prejudice in this regard. The flip-side of the counsel-need-not-raise-meritless-issues coin is the no-prejudice-from-the-failure-to-bring-them side. And particularly in this case, it cannot be said that prejudice inures from a perjury-free trial at which Defendant was able to call previously unavailable witnesses.

---

[43] *United States v DiPietro*, 936 F2d 6 (CA 1, 1991).
[44] *People v Riley*, 465 Mich 442, 448; 636 NW2d 514 (2001).
[45] *Arizona v Washington*, 434 US at 503.
[46] *People v Riley (Aft Rem)*, 468 Mich 135, 142; 659 NW2d 611 (2003).

IV. Appellate review of mistrials, manifest necessity, and consent, demands consideration of the entire record. Precedent grounded, semantically and analytically, in the "mere" review of one instantaneous moment of silence within a trial record frustrates that demand.

Standard of Review

In general, double jeopardy challenges present questions of law reviewed by this Court de novo.[47]

Discussion

Since 1886, this Court has recognized that a defendant's consent to discharging a jury pre-verdict may be found from circumstances beyond a defendant's own motion. Likewise, a defendant's consent to jury discharge may be express, or implied.[48]

Ninety years later, Alvin Johnson was originally tried, with a co-defendant, for Armed Robbery. When his own attorney asked a police officer whether Mr. Johnson had asked about taking a polygraph, the prosecution moved for a mistrial, joined by counsel for co-defendant. The prosecution later withdrew the motion, but co-counsel successfully renewed it. Counsel for Mr. Johnson was silent.[49]

Prior to a second trial, Johnson unsuccessfully moved to dismiss, arguing that the trial court abused its discretion in granting the mistrial and that double jeopardy protection required dismissal. Then, just before the second trial began, Johnson pleaded guilty to a reduced charge. This Court granted leave to appeal in *People v Johnson*, "limited to the question of whether the grant of a mistrial over

[47] *People v Ream*, 481 Mich 223, 226; 750 NW2d 536 (2008).
[48] *People v Gardner*, 62 Mich 307, 311-312; 29 NW 19 (1886).
[49] *People v Johnson*, 396 Mich 424, 428-429; 240 NW2d 729 (1976), repudiated by *People v New*, 427 Mich 482, 398 NW2d 358 (1986).

defendant-appellant's objection barred subsequent prosecution under double jeopardy provisions of the federal and state Constitutions."[50] This Court's overall holding was that the defense of double jeopardy was not waived by a subsequent plea.[51] On the way to that holding, this Court cited an Arizona court's preference—admittedly contrary to other courts—for the proposition that "[m]ere silence or failure to object to the jury's discharge is not . . . consent" to the declaration of a mistrial.[52] That proposition from *People v Johnson* is at the heart of this fourth question contained in the Order for MOAA.

(This Court also articulated in *Johnson* that "the defense of double jeopardy, those grounded in the due process clause, *those relating to insufficient evidence to bind over at preliminary examination and failure to suppress illegally-obtained evidence without which the people could not proceed* are other examples" of things not waived by plea.[53] Ten years later, this Court repudiated the italicized statement as obiter dictum.[54])

Returning to the issue of consent to a mistrial as permitting a subsequent prosecution, this Court in *Johnson* noted that the important feature to the inquiry is whether a "defendant retains primary control over the course to be followed."[55] But the overall analysis seemed to indiscriminately bounce between actions taken by counsel and whether Mr. Johnson personally approved of the mistrial. The Court

---

[50] *Johnson*, 396 Mich at 430, quotation and citation omitted.
[51] *Johnson*, 396 Mich at 428.
[52] *Johnson*, 396 Mich at 432, citing *State v Fenton*, 19 Ariz App 274, 276; 506 P2d 665 (1973).
[53] *Johnson*, 396 Mich at 444, emphasis added.
[54] *New*, 427 Mich at 489-490.
[55] *Johnson*, 396 Mich at 432, citation omitted.

suggested that "[i]t is not difficult to require a trial court to inquire whether defendant consents."[56] Even the Court's Order granting leave in that case seemed to ill-fit the actual facts in that case. For that defendant did not object to the grant of that mistrial, as the leave grant suggested; indeed, it was his silence that was analyzed. Only later on, before the second trial was to commence, did counsel move to dismiss on double jeopardy grounds. But that subsequent maneuver was distinct in time from the actual grant of the mistrial. Nevertheless, the grant in that case asked the question "whether the grant of a mistrial over defendant-appellant's objection barred subsequent prosecution . . .."[57]

This Court presently wishes to address whether the statement in *Johnson* that "mere silence or failure to object the jury's discharge is not such consent" is an accurate statement of law. It is not.

Just two years after *Johnson*, the Court of Appeals struggled in *People v Hoffman* to interpret its application.[58] In that case, the prosecution moved for a mistrial after a defense witness's out-of-bounds testimony. After a chambers conference, defense counsel concurred in the prosecution's motion; the defendant was subsequently retried and convicted.[59]

On appeal, Mr. Hoffman argued that *Johnson* required a showing either that he personally consented to the mistrial in that case, or that he exerted primary control

[56] *Johnson*, 396 Mich at 433.
[57] *Johnson*, 396 Mich at 430.
[58] *Hoffman*, 81 Mich App 288.
[59] *Hoffman*, 81 Mich App at 290-292.

in deciding to accede to that prosecution's motion for mistrial.[60] The Court of Appeals majority interpreted *Johnson* as allowing an express manifestation of consent from either a defendant, personally, or from counsel. As counsel had concurred in the motion for mistrial, the double jeopardy bar was eliminated.[61]

The concurrence in *Hoffman* chose to focus instead on whether that defendant had personally exercised primary control. That judge would have required personal consent on the record by the defendant, or that counsel establish on the record that consent resulted from a process over which the defendant had primary control. Nevertheless, and in the absence of any record that the defendant actually participated in the chambers conference, or even consulted with counsel afterward, the concurrence believed that the defendant had the requisite primary control over the proceedings.[62]

This Court's MOAA Order asks the parties to compare *Johnson* with *People v Lett*, the next chronological data point in our analysis. More pointedly, the Court refers to *Lett*'s footnote 15, in which this Court "save[d] for another day the issue of implied consent."[63] That day is upon us.

Lett involved a hung-jury mistrial. The first jury in that case sent out a note indicating that it could not agree on a verdict.[64] That trial court questioned the foreperson on the record, and when told that the jury was not going to reach a verdict, the court declared a mistrial. The defendant was retried, convicted, and

[60] *Hoffman*, 81 Mich App at 293.
[61] *Hoffman*, 81 Mich App at 298.
[62] *Hoffman*, 81 Mich App at 291 n 1, 302.
[63] *Lett*, 466 Mich at 222 n 15.
[64] *Lett*, 466 Mich at 209.

alleged a double jeopardy violation for the first time in his appeal to the Court of Appeals.[65]

The Court of Appeals reversed. That court concluded that the defendant did not consent, citing the now-questioned passage from *People v Johnson*. And it went on to find that manifest necessity was lacking based on the trial court's failure to consider alternatives (e.g., deadlock jury instruction) and make findings on the record (e.g., that the jury was genuinely deadlocked).[66]

This Court reversed the Court of Appeals because the mistrial was occasioned by manifest necessity.[67] Portions of this Court's analysis toward that conclusion have been discussed in section I. of this Brief, above. And even within that manifest-necessity analysis, concepts relevant to consent found their way onto the page. For example, this Court found that ". . . in the absence of an objection by either party, the declaration of a mistrial in this case constituted a proper exercise of judicial discretion. Accordingly, manifest necessity for the jury's discharge existed . . .."[68] And shortly before that passage, this Court wrote ". . . the fact remains that defendant did not request that (the deadlocked jury) instruction be given."[69] It was this last passage to which footnote 15 was attached.

Footnote 15 cites eleven cases for comparison to *Johnson*, per this Court's MOAA Order. Ten of those cites span ten federal circuit courts; the eleventh a dissent in one of this Court's cases.

---

[65] *Lett*, 466 Mich at 210.
[66] *Lett*, 466 Mich at 211-212.
[67] *Lett*, 466 Mich at 218-223.
[68] *Lett*, 466 Mich at 223.
[69] *Lett*, 466 Mich at 222.

The federal circuit closest to home is the Sixth, the Court that decided *United States v Gantley*. In that case, the defendant testified about taking a polygraph. The trial court reacted quite strongly, and later recused itself and explained the occurrence of the mistrial to the jury. Defense counsel did not have anything to add.[70] That defendant moved to dismiss prior to the next trial, but the (new) trial court found manifest necessity for the mistrial.[71] The Sixth Circuit found both that the mistrial was manifestly necessary, and that the defendant implicitly consented to the mistrial. Importantly, the court pointed out that the defendant's "absence of explicit consent must be examined in light of all of the circumstances surrounding it."[72]

The remaining cases from the remaining federal circuits arose from varied facts, but all lend support to the Sixth Circuit's in-light-of-the-circumstances approach. Four of the cases from footnote 15 arose in the context of hung juries. In the First Circuit's *United States v Aguilar-Aranceta*, a jury announced that it reached a verdict in one count but were deadlocked on the second. The court had a chambers conference with the parties, at which several options were discussed. Then, with no objection from either party, the mistrial was declared. The appellate court held that "[i]n view of these facts, defendant effectively waived any subsequent double jeopardy claim she might have had."[73]

---

[70] *Gantley*, 172 F3d 422, 425-426.
[71] *Gantley*, 172 F3d at 427.
[72] *Gantley*, 172 F3d at 429.
[73] *United States v Aguilar-Aranceta*, 957 F2d 18, 22 (CA 1, 1992), abrogated on other grounds by *Yeager v United States*, 557 US 110; 129 S Ct 2360; 174 L Ed 2d 78 (2009).

United States v Beckerman comes to us from the Second Circuit. After a jury note indicated deadlock, the AUSA asked for a deadlock instruction. Defense counsel did not say anything at the time. During inquiry of the jury, counsel asked to make a suggestion, but was rebuffed and the court declared a mistrial. Counsel then asked for additional jury instruction, and was again rebuffed. On appeal, the Second Circuit considered the record and disagreed with the defendant that the mistrial was too hasty for him to make an objection. Importantly, even though counsel was not totally passive, "it was silent on the prospect of a mistrial and nothing was said to dispel the inference of accord."[74]

The Third Circuit weighed in with *United States v Phillips*. That trial court proposed to dismiss the deadlocked jury. Both counsel thought deliberation should continue, but neither objected to the court's proposal. The Third Circuit suggested that a purpose of an objection would have been to flush out the status of deliberations. The court placed a burden on the defendant, and without an objection the only record was of an experienced trial court's decision. In other words, any deficiency in the record was borne by the defendant and his lack of objection.[75]

The last hung-jury scenario comes from the Eleventh Circuit and *United States v Puleo*. The hung jury in that case received a deadlocked-jury instruction after discussion with counsel. When it did not work, the court declared a mistrial. On appeal, the Eleventh Circuit held that the defendant vitiated by her consent any double jeopardy claim. That trial court expressed a clear intent to declare a

[74] *United States v Beckerman*, 516 F2d 905, 907-909 (CA 2, 1975).
[75] *United States v Phillips*, 431 F2d 949 (CA 3, 1970).

mistrial; counsel had an opportunity to object but did not. The Eleventh Circuit blended the concept of harbored error into its analysis: "It simply will not do for counsel to preserve an error for appellate review without giving the trial court a reasonable opportunity to render a decision upon the same objection."[76] In short, opportunity plus silence equals consent.

The Fourth Circuit presents a case not with a hung jury, but a failure to fully try a case to a jury. In *United States v Ham*, a defendant was convicted of RICO but the trial court failed to instruct the jury to address related property forfeiture and the jury failed to complete the verdict form on some predicate acts. The appellate court reversed the original conviction due to the improper admission of evidence, and after remand the defendant moved to dismiss the forfeiture and predicates on double jeopardy grounds. The issue of consent arose within the context of the forfeiture. The Fourth Circuit found that the defendant did not expressly consent to the dismissal of the jury before it had addressed the forfeiture, but found implicit consent in his failure to object to the jury's dismissal. The appellate court reviewed the record and noted that after the (incomplete) verdict was read, the trial court thanked the jurors for their time, apologized for the inconvenience, and wished them a happy holiday. The Fourth Circuit found that defense counsel could have interrupted the trial court; had he wanted the jury to decide the forfeiture, he should have informed the trial court. Ultimately, the defendant could not profit by his failure to act.[77]

---

[76] *Puleo*, 817 F2d at 704-705.
[77] *United States v Ham*, 58 F3d 78, 80-84 (CA 4, 1995).

The remaining cases cited in *Lett*'s footnote 15 cover a diverse set of scenarios. The Fifth Circuit's *United States v Palmer* involved a pregnant defendant. Pregnancy complications sent the defendant to the hospital in the midst of a multiple-defendant trial. The medical issue did not resolve itself despite many attempts to accommodate the defendant, and the trial court severed the defendant's case and mis-tried it. Trial counsel (the defendant herself was absent) made no objection and asked to be excused. The defendant then moved to dismiss her indictment prior to the second trial. After her conviction, the Fifth Circuit held that she had implicitly consented to the mistrial. Even though she had earlier expressed (through counsel) her desire to get the first trial over with, at the moment of (mistrial) truth, counsel made no objection. The Fifth Circuit required a timely, explicit objection to a sua sponte mistrial declaration; the defendant did not satisfy that requirement.[78]

The Seventh Circuit and *Camden v Circuit Court of the Second Judicial Circuit, Crawford County, Illinois*, returns us to a jury issue, but this time a single juror's bias. That defendant sought to raise an intoxication defense in her attempted murder trial. During a lunch recess on the third day of trial, one of the jurors voiced misgivings, based on a previous drinking problem, relevant to impartiality. After questioning of the juror and an off-the-record discussion with counsel, the trial court discharged the jury. Defense counsel thanked the jurors and participated in discussions about the new trial, and did not raise the double jeopardy issue until prior to the second trial's commencement. The Seventh Circuit examined the record

[78] *United States v Palmer*, 122 F3d 215, 217-219 (CA 5, 1997).

and concluded that both the defendant and counsel were afforded a "minimal but adequate opportunity to object . . . while the mistrial was being declared."[79] Furthermore, the reference to a second trial should have prompted counsel to object to the propriety of the mistrial. Ultimately, counsel's failure to avail himself of the opportunity to object amounted to implied consent. And that conclusion was bolstered by counsel's conduct even after the mistrial was declared.[80]

The penultimate federal case from footnote 15 comes from the Ninth Circuit. In *United States v Gaytan*, the trial court dismissed the case mid-trial for a perceived *Brady* violation. The Ninth Circuit reversed and remanded. The district court again dismissed the case, this time on double jeopardy grounds. On the way to affirming the second dismissal, the Ninth Circuit offered its articulation of a totality-of-the-circumstances test, requiring the circumstances to positively indicate a willingness to acquiesce in a mistrial. The particular circumstances in that case did not so indicate. The court noted that the defendant temporarily lost the ability to influence the proceedings. The trial court dismissed the case in a matter of seconds, without pausing to discuss alternatives. And the trial court abruptly left the bench without discussing future court dates.[81]

Finally we have the Tenth Circuit and *Earnest v Dorsey*. In his first murder trial, Mr. Earnest moved for a mistrial based on statement admitted into evidence. The trial court held the motion in abeyance. Then the defendant moved for a

---

[79] *Camden v Circuit Court of the Second Judicial Circuit, Crawford County, Illinois*, 892 F2d 610, 615 (CA 7, 1989).
[80] *Camden*, 892 F2d at 615.
[81] *United States v Gaytan*, 115 F3d 737, 740-743 (CA 9, 1997).

mistrial on a distinct ground; the court again took a wait-and-see posture. When that wait-and-see morphed into an announcement by the court that it would grant the defendant's motion for mistrial, counsel immediately attempted to withdraw the motions. The trial court nevertheless declared a mistrial based on the defendant's motion. The Tenth Circuit was swayed by the fact that the defendant did not attempt to withdraw his motions before they were granted. In short, counsel was given ample opportunity to withdraw any mistrial motion.[82]

To that federal litany is added a discussion of the last remaining case referenced in footnote 15, *People v Hicks*. More specifically, this Court in *Lett*'s footnote cited, in turn, a footnote from the dissent in that case.[83] *Hicks* involved two defendants, and included an opinion by two justices, a concurrence with that result by one justice, a partial concurrence/dissent by two justices, a concurrence/dissent by one justice, and a dissent in one of the two defendants' cases by two justices. The footnote comes from this last dissent.

Mr. Hicks was tried to bench for Assault with Intent to Commit Murder. Mr. Bellew was tried to bench, the same judge as Hicks', for Receiving and Concealing Stolen Property over $100. Discovered during each trial were associations between the judge and the respective defenses. Both times, the trial court recused.

[82] *Earnest v Dorsey*, 87 F3d 1123, 1128-1129 (CA 10, 1996).
[83] *Lett*, 466 Mich at 222, n 15, citing *People v Hicks*, 447 Mich 819, 858 n 3; 528 NW2d 136 (1994).

A new judge offered to continue Hicks' trial; Hicks refused and a mistrial was declared. The Court of Appeals in that case concluded that there was no manifest necessity.[84]

Mr. Bellew objected to the first judge's recusal, and a second judge declared a mistrial, and then dismissed the case on double jeopardy grounds. The Court of Appeals in that case affirmed that dismissal.[85]

When the appellate dust finally settled, this Court had reversed and remanded for trial in *Hicks*, and affirmed the dismissal in *Bellew*. As the dust was settling, the justices concluded that Hicks had not consented but that manifest necessity terminated the first trial, allowing for retrial. And a majority of justices concluded that Bellew's mistrial was not manifestly necessitated. Returning to the issue of consent to mistrial, two dissenting justices concluded that Bellew did indeed consent. Those two justices emphasized that "only a request is necessary to lift the bar to double jeopardy," and attached footnote 3 (the footnote in turn cited in *Lett*'s footnote 15).[86] The *Hicks* dissent's footnote 3 cited *United States v Dinitz*, and suggested that the United States Supreme Court and the lead opinion in *Hicks* were inconsistent in their respective analyses of "consent," the former equating consent with a request and the latter equating it with acquiescence. Because Bellew rejected transfer of the case to the substitute judge, choosing instead to abort the first trial,

[84] *Hicks*, 447 Mich at 823-834.
[85] *Hicks*, 447 Mich at 824-826.
[86] *Hicks*, 447 Mich at 857.

the two-justice dissent would have held that he waived the opportunity to try his case to its terminus.[87]

So, from *Johnson*, to *Hoffman* two years later, to *Lett* (in its own right, and through the numerous cases cited in footnote 15), we next reach *People v McGee*.[88] This Court ruled in *McGee* one year after it had in *Lett*; the Court of Appeals in *McGee* had ruled one year before *Lett*. In *McGee*, thirteen jurors were in the deliberation room. The Court of Appeals found that the defendant did not acquiesce or consent to the mistrial, but that the manner in which the verdict was ultimately received occasioned manifest necessity.[89]

This Court vacated that analysis, and instead found that the record in *McGee* "reveal(ed) circumstances from which consent to the circuit court's declaration of a mistrial can be inferred."[90] (Now Chief) Justice Markman dissented. Justice Markman acknowledged the recent decision in *Lett*, but on the issue of consent, cited the passage from *Johnson* now at issue, and was unaware of evidence that the defendant consented to the mistrial.

Chronologically, a final entry onto the consent-to-mistrial landscape comes from this Court's treatment of *People v Camp*. Mr. Camp was charged with sexually assaulting his nephew and his nephew's foster brother in two counties. He was acquitted in Livingston County, and during the Lenawee County trial a witness mentioned the Livingston trial. Defense counsel immediately moved for a mistrial.

---

[87] *Hicks*, 447 Mich at 865.
[88] *McGee*, 469 Mich 956 (2003).
[89] *People v McGee*, 247 Mich App 325, 343; 636 NW2d 531 (2001), vacated by *McGee*, 469 Mich 956.
[90] *McGee*, 469 Mich 956.

Later, counsel asked that the jury be informed of the result—acquittal—of the Livingston trial. The trial court declared a mistrial, after which the defendant moved for a double jeopardy dismissal. The trial court recognized that society is entitled to a fair trial, and that the defendant's conditional request for a mistrial amounted to consent. After he was convicted at the second Lenawee trial, the Court of Appeals reversed. That court found that it was the prosecution that implicitly requested the mistrial, and that the defendant's conditional request did not amount to consent.[91]

In lieu of granting leave to appeal, this Court reversed. The Court concluded that the trial court had not clearly erred in finding that the defendant had consented to the mistrial.[92]

A number of lessons can be gleaned from the foregoing review. Those lessons speak to the difficulties in continuing to struggle with the questioned passage in *People v Johnson*, as well as to the concepts of manifest necessity and consent more generally.

First, and as banal as it sounds, mistrials are disquieting. The criminal justice system should remain disturbed by defendants' ongoing subjection to its processes. So too should it remain disturbed by the frustration of society's interest in fair trials. Defining and traversing the path through these sometimes-competing interests is important.

---

[91] *People v Camp*, unpublished opinion per curiam of the Court of Appeals, issued September 17, 2009 (Docket No. 285101.

[92] *People v Camp*, 486 Mich 914; 781 NW2d 803 (2010).

One, if not the, fundamental concern is that defendants retain primary control over their fates. And related to that goal is the recognition that defendants and their attorneys are charged with, and acknowledged together as, exercising that control.

When courts undertake to review the occasion of a mistrial, that review must contemplate the totality of the circumstances. On a case-by-case basis, the circumstances before, during, and after the declaration of a mistrial may inform the analysis. In this sense, the incongruence of the *Johnson* language, "mere silence or failure to object to a mistrial is not consent," is the word "mere." That word suggests that an instantaneous snapshot of a trial's proceedings can be dispositive. Such a conclusion runs contrary to the near-universal call, apparent throughout the cases discussed above, to examine the entire record. In our current case, for example, the minutes prior to the declaration of the mistrial evidence first a chambers conference and then a bench conference and then a lengthy factual recap that included an explicit reference to anticipated action by the court. And, hours prior to the mistrial, the record evidences a defendant whose case was going to be submitted to the jury without him calling two witnesses on his behalf. And, not only at the snapshot moment of mistrial, but in the minutes, hours, days, and weeks after the mistrial, Defendant raised no jeopardy-related complaint.

Surely, any totality of circumstances could be made more total by an explicit proffer of any nature by a defendant. And trial courts should be encouraged to solicit relevant input, and do so on the record. But even in the absence of explicit,

record, statements by defendants, silence is not "mere" when it is attended by other sufficient recorded conditions that would suggest that silence is the manner in which a defendant chose to maintain control.[93]

Encouraging trial courts to solicit relevant input regarding consent would also, at least occasionally, serve to inform manifest necessity findings and review. For a non-consenting defendant can simultaneously express non-consent by offering appropriate alternatives that diminish or eliminate a mistrial's necessity in the first instance.

But even where such encouraged solicitation is missing or minimal, a holistic review of an extant record can still suffice to establish acquiescence amounting to consent. In other words, even if explicit is better than implicit, implicit can still be adequate. Returning to the word "mere" in the questioned passage from *Johnson*, it is that word, and the inquiries it forestalls, that must be excised. Instead, the relevant inquiries are as varied as the facts that have occasioned, and will no doubt continue to occasion, confrontations with prospective mistrials. Only a totality-of-circumstances construct, considering a defense team's retention of control as itself informed by any opportunities within which to act, is up to the task. That construct will encourage action and acknowledge circumstances attending and informing inaction. And reiterating, encouraged action will have the added benefit of illuminating parallel manifest necessity inquiries.

Defendant in this case did not want his case to go to the first, or any, jury without testimony from two of his witnesses. He was on notice as early as a

[93] *DiPietro*, 936 F2d at 9-10.

chambers conference that the trial court was contemplating a mistrial. Or if not then, then during a subsequent bench conference. Or, if not then, then when the prosecution said:

> "[w]hatever the Court does, whatever action the Court takes, obviously, we will respect, and I understand that the Court has concerns as do I. I guess my only question is whether or not this impacts on the complaining witness's testimony. That would be the only thing that I would ask the Court to consider before you make the ruling."[94]

"[B]efore you make the ruling." Not "before you decide what you're going to do." Or other vagaries.

Or, if not then, then when the court scheduled a pretrial hearing. Or any time prior to the second trial's commencement. The totality of those circumstances is anything but "mere."

So it is the word "mere," and its gestalt, that makes *Johnson* both inaccurate and unworkable. Relatedly, *Johnson*'s analysis tacitly relied on a requirement that the defendant personally consent; that is also inaccurate. Remedying those inaccuracies will actually enhance practical workability. To the extent that defendants are choosing to remain silent in reliance on the questioned passage from *Johnson*, removing any incentive to harbor error via silence will not work any undue hardship. And development of the law over the past 40 years suggest that the questioned passage is inapposite to what actually transpires during and after jury trials that prematurely terminate.[95] This Court has already seen fit to examine

[94] TT 3.24.14, p 237.
[95] *People v Tanner*, 496 Mich 199, 250-251; 853 NW2d 653 (2014).

the entire record of cases it has reviewed, as opposed to limiting itself to examining one, "mere," snapshot moment in time.[96]

The day has come for this Court to articulate a framework encompassing the totality of circumstances before, during, and after the declaration of a mistrial. A framework that considers defendants' retention of control within their respective opportunities to exercise it. In general, opportunity plus silence can result in chosen consent. In this particular case, Defendant had multiple and ongoing opportunities to express non-consent; his resulting silence is exactly what he intended it to be, an opportunity for another trial with all of his witnesses. In future cases, trial and appellate courts should be instructed to review the entirety of their records as they bear on defendants' control over, and consent to, mistrials.

[96] Even the dissent in *McGee* spoke to a willingness to review any evidence, 469 Mich 956.

Relief Requested

Plaintiff-Appellee, the People of the State of Michigan, respectfully request that this Court deny Defendant-Appellant's Application for Leave to Appeal, or grant other relief consistent with the analyses above.

Respectfully submitted,

Brian L. Mackie (P25745)
Washtenaw County Prosecutor

By: /s/ Mark Kneisel
Mark Kneisel (P49034)
First Assistant Prosecutor
P.O. Box 8645
Ann Arbor, MI 48107
(734) 222-6620

January 27, 2017